

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
High-Cost Universal Service Support)	WC Docket No. 05-337

REPLY TO CTIA OPPOSITION TO APPLICATION FOR REVIEW

Accipiter Communications Inc. (“Accipiter”), pursuant to Section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, hereby replies to the Opposition of CTIA – the Wireless Association to Applications for Review and Requests for Stay submitted in the above-referenced dockets on June 1, 2011 (“CTIA Opposition”). Among other things, the CTIA Opposition opposes grant of Accipiter’s request for review by the Commission of the Wireline Competition Bureau’s (“Bureau’s”) Order issued on April 25, 2012 in the above-referenced dockets (the “Bureau Order”).¹

I. CTIA DOES NOT ADDRESS THE ARGUMENTS IN ACCIPITER’S APPLICATION.

While CTIA asks the Commission to deny Accipiter’s application for review, CTIA merely references the Application in a footnote and does not discuss the matters raised in the application or point to specific flaws with the application that demonstrate that the application does not merit relief. Rather, CTIA advances only a general defense of the Commission’s efforts to reform USF support mechanisms. CTIA focuses on the process of reforming USF support and intercarrier compensation mechanisms, essentially advancing an argument in support of the

¹ *Connect America Fund, High-Cost Universal Service Support*, Order, WC Docket Nos. 10-90, 05-337, DA 12-646 (April 25, 2012).

policy objectives the Commission is attempting to further with its reforms. This largely misses the point of Accipiter's Application for Review – regardless of the merits of the policies the Commission is pursuing, the Commission's implementation of its desired reforms as they apply to Accipiter and similar carriers may still be flawed in ways that fail to conform with applicable legal standards.

Thus, for example, while CTIA asserts that the “regression-based benchmarks that the Commission has imposed on [rate-of-return] ILECs' reimbursable capital and operating costs are valid responses to significant problems,” CTIA makes no effort to address the significant problems Accipiter has identified with the Bureau's specific methodology. Instead, CTIA generally refers to “various errors and inaccuracies” other parties have pointed out in the Bureau's methodology and the data underlying that methodology, and dismissively claims that “absolute perfection in every application is simply not attainable.”²

This is not a reasonable response. Accipiter has never claimed that “absolute perfection” in the Bureau's methodology is either required or attainable. Instead, Accipiter has pointed out that the existence of a number of very serious flaws in the data upon which the Bureau's model is constructed leads to an inaccurate model.³ By way of example, as Accipiter stated in its Application for Review, a number of commenters questioned the accuracy of the study area boundaries based on TeleAtlas wire center data.⁴ In particular, the Rural Associations pointed to data suggesting that 144 of the 357 study areas for which NECA has actual boundaries are not

² CTIA Opposition at 4, citing RLEC Association Stay Petition at 3-6 and EATEL Stay Petition at 2-5.

³ See *e.g.*, Accipiter Application for Review at 2-4.

⁴ Bureau Order at ¶ 24.

accurate within five percent, 80 are not accurate within 20 percent, a significant number differ by more than 50 percent, and a few are wholly inaccurate.⁵ In Accipiter's own case, the TeleAtlas data indicates a study area of 30.5 square miles while Accipiter's actual study area is 1,010 square miles, and the TeleAtlas study area only partially envelops Accipiter's actual study area. Further, as Accipiter has already noted to the Commission, the census data which the Commission uses as inputs to its model in the *Report and Order* are subject to a substantial degree of error.⁶ These are not trivial or insignificant errors that merely have the effect of preventing the model from achieving "absolute perfection." Rather, they are significant inaccuracies in the inputs to the model that will inevitably create errors or inaccuracies in the outputs of the model. CTIA cannot dismiss or minimize the importance of such fundamental problems with the data upon which the model is constructed.

II. WAIVERS DO NOT ADEQUATELY ADDRESS THE FLAWS IN THE BUREAU ORDER.

While it does not seriously address the numerous specific problems Accipiter has identified with the Bureau's model and the data underlying that model, CTIA asserts that, ultimately, the possibility of seeking a waiver of the application of the rules adequately addresses any issues with the model.⁷ There are two problems with this approach. First, as Accipiter expressly discussed in its Application for Review, but CTIA fails to address, the Bureau's approach of allowing carriers to file waivers to correct errors in their study area boundaries is no solution at all, because the coefficients which the Bureau Order adopts to calculate capped costs

⁵ *Id.* citing Rural Association Comments, Appendix D at 3-4.

⁶ Accipiter Petition for Reconsideration and Clarification, 12-14, WC Docket No. 10-90, filed December 29, 2011.

⁷ CTIA Opposition at 4.

are locked in place for 2012 and 2013 despite the fact that they are plainly flawed because they are based on flawed inputs.⁸ A formula with flawed coefficients cannot produce correct results merely through the correction of independent variables. In fact, a correction in the inputs to a flawed formula is just as likely to produce results with even *more* significant errors.

Second, waivers are an adequate solution because there is so much instability built into the Commission's new system. Accipiter's Application for Review identified three factors, including flawed input data, the use of untested proxies, and data that is updated according to different schedules, that combine and compound to create cascading errors in the output of the model. The result is a methodology that is fundamentally flawed, prone to additional and different errors over time and not likely to produce reasonably rational or predictable results. Moreover, while carriers can predict support levels for 2013, it is impossible to predict those levels for 2014 and beyond given that corrected inputs will be used to rebuild the Bureau's model. Investment decisions must be made over a much longer time horizon than the FCC's approach contemplates. The Bureau's methodology thus suffers from a fatal legal defect because it does not comply with the statutory requirement that support be "predictable."⁹

In this case, the methodology implemented by the Bureau does not allow a carrier such as Accipiter to predict what its capex and opex limits will be in the future. A carrier thus has no way to make even vaguely accurate predictions regarding the level of support it will receive, and thus has no reasonable ability to make prudent investment decisions. The subjective selection of inputs to the methodology for calculating benchmarks injects uncertainty and unpredictability into the support mechanisms. The fact that these subjectively selected inputs, as well as other

⁸ Accipiter Application for Review at 3.

⁹ *Id.* at 6-8.

factors, may be subject to revision by the Bureau from year to year only exacerbates the uncertainty and unpredictability. As Accipiter stated in its Application for Review, because the Commission has not put in place constraints on its ability to redesign models each year, there is no reasonable way for a carrier to understand enough about the model to make informed investment decisions or make reasonable financial forecasts.¹⁰ All of this works directly against the Commission's stated objective of promoting the deployment of broadband networks.

These are fundamental, structural problems with the Bureau's Order that the waiver process is ill-equipped to address, in part because carriers cannot know with any reasonable degree of certainty how quickly waivers will be processed and whether they will be granted. The statutory requirement that support be "predictable" is not optional, and the waiver approach does not solve the basic lack of predictability that is built into the new system. This is why Accipiter has recommended three specific steps the Commission should take to correct the flaws in the Bureau Order.¹¹ First, the Commission should delay implementation of the model until the Bureau collects accurate input data upon which a more accurate, rational model can be constructed. Second, after new formulas are finalized, the Commission should delay implementation of support limits for one year to provide carriers with sufficient time to understand the model, understand its impacts, and file for and receive waivers, if needed, in sufficient time to avoid calamitous results from immediate implementation. Finally, the Commission should "lock in" independent variables and coefficients for a specific period of time, not less than ten years, to satisfy the statutory requirement that universal service support be predictable.

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 9.

III. CONCLUSION

While it is obvious from CTIA's filing that CTIA supports the policy objectives underlying the Bureau Order, CTIA makes no effort to specifically engage with the arguments Accipiter has advanced in its Application for Review. The CTIA Opposition thus presents no barrier to Commission reconsideration of the Bureau Order. For the foregoing reasons, Accipiter respectfully requests that the Commission reconsider the Bureau Order and grant Accipiter's Application for Review.

Respectfully Submitted

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